CRIMINAL YEAR SEMINAR

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Criminal Rules Update

Prepared By:

The Honorable David Cutchen

Presiding Judge of the Gilbert Court

&

Gary Shupe

Deputy City Prosecutor, Phoenix City Prosecutor's Office

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ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

3838 N. Central Ave., Suite 850 Phoenix, Arizona 85012

And

CLE WEST

5130 N. Central Ave Phoenix, AZ 85012

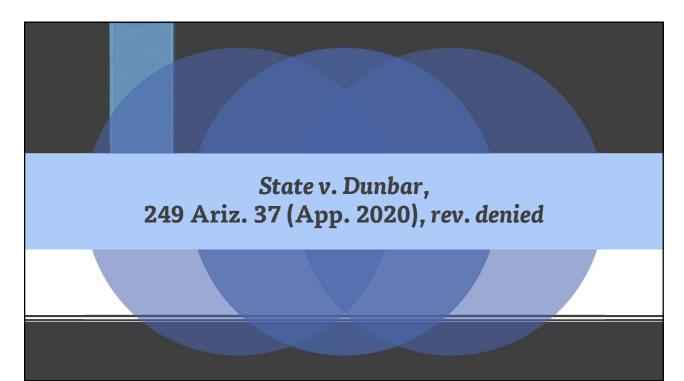


Criminal Rules Update

Presented by APAAC and CLE West



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State v. Dunbar

- Dunbar decides to represent himself
- Dunbar might want counsel, declines
- Dunbar might want counsel, counsel appointed; Dunbar balks, represents self; Court warns Dunbar
- Dunbar wants counsel, counsel appointed; Court warns Dunbar
- At trial, Dunbar asks to represent himself; Court denies request

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State v. Dunbar

- 6th Amendment: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."
- ARCrP 6.1(a): "A defendant has the right to be represented by counsel in any criminal proceeding...."
- But a defendant also has a constitutional right to self-representation.

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State v. Dunbar

- Self-representation: waiver of counsel must be timely and unequivocal
- Timely = before the jury is empaneled
- Unequivocal = clearly; free from uncertainty
- Right to self-representation not unqualified
- Right to self-representation can be forfeited through persistent vacillation

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State v. Dunbar

Dunbar's (last) request to represent himself was timely.

Dunbar had not acted to delay or in bad faith.

But had he been unequivocal?

COA held that Dunbar forfeited his right to self-representation by repeatedly changing his mind.



State v. Bolivar

ARCrP 10.3. Changing of the Place of Trial

- (a) Grounds. A party is entitled to change the place of trial to another county if the party shows that the party cannot have a fair and impartial trial in that place for any reason other than the trial judge's interest or prejudice.
- (b) Prejudicial Pretrial Publicity. If the grounds to change the place of trial are based on pretrial publicity, the moving party must prove that the dissemination of the prejudicial material probably will result in the party being deprived of a fair trial.

State v. Bolivar

- ARCrP 10.3b indicates that a defendant is entitled to a change of venue if there is a probability that the defendant will be denied a fair and impartial trial due to the dissemination of trial publicity.
- When judging the impact of publicity on a trial, "the relevant inquiry is the effect of the publicity on a juror's objectivity, not the mere fact of publicity." Bolivar, 250 Ariz. at ____, ¶ 32 (cleaned up).

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• The appellate court must determine whether, based on a totality of circumstances, "the publicity attendant to defendant's trial was so pervasive that it caused the proceedings to be fundamentally unfair." Id. • A trial court will not be overturned absent a "clear showing of abuse of discretion and resulting prejudice to the defendant." Id. • No abuse of discretion was found pursuant to this analysis.

ARCrP 19.1. Conduct of Trial (motion for mistrial)

ARCrP 19.3. Admonitions

The court must admonish jurors not to:

- (a) converse among themselves or with anyone else on any subject connected with the trial until instructed to deliberate;
- (b) permit themselves to be exposed to news accounts about the proceeding;
- (c) form or express any opinion about the case until it is finally submitted to them;
- (d) view in person or through technological means the place where the offense allegedly was committed; or
- (e) conduct any independent research, investigation, or experiments, or otherwise consult any outside source about any issue in the case.

State v. Bolivar

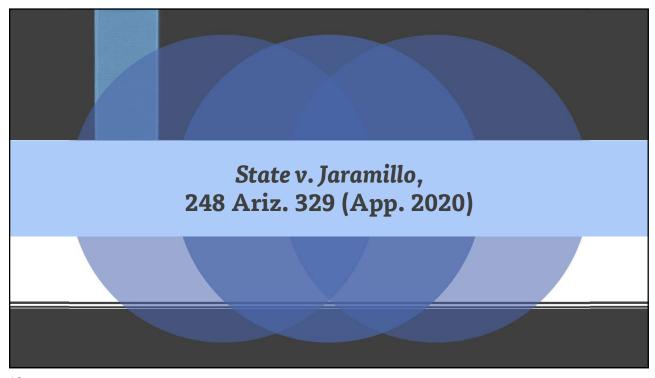
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A motion for mistrial was filed by the defendant where he alleged juror misconduct.

State v. Bolivar

A defendant is entitled to a mistrial based on juror misconduct only if (1) a juror obtained information the juror was not permitted to obtain, and (2) that juror was probably influenced by that information.

The motion for mistrial was denied in this case as the defense was not able to prove that any jurors were influenced by the newspaper article, and because of all the instructions, reminders, and actions taken by the trial court.



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Background The state's theory: Two friends conspired to peddle heroin and launder money out of a store that sold prepaid mobile phones. The codefendants' theory: The other guy did it (i.e., antagonistic defenses). Over the codefendants' repeated objection, they were tried together.

State v. Jaramillo

Joinder

ARCrP 13.3(b): "Two or more defendants may be joined if each
defendant is charged with each alleged offense, or if the alleged
offenses are part of an alleged common conspiracy, scheme, or
plan, or are otherwise so closely connected that it would be
difficult to separate proof of one from proof of the others."

Severance

 ARCrP 13.4: "On motion or on its own, and if necessary to promote a fair determination of any defendant's guilt or innocence of any offense, a court must order a severance of counts, defendants, or both."

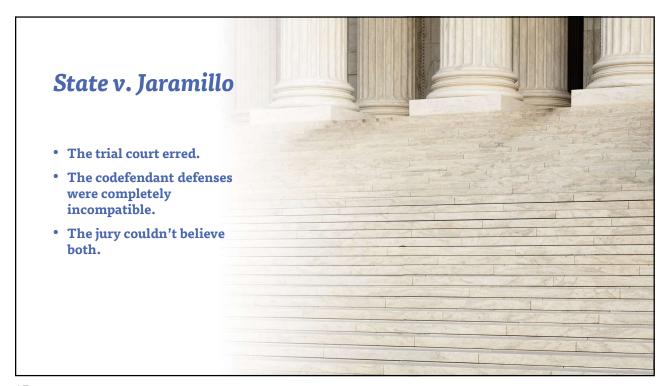
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State v. Jaramillo

Joint trials preserve judicial resources.

But cases where defendants present antagonistic, mutually exclusive (i.e., irreconcilable) defenses shouldn't be joined.

Mutually exclusive means that, for the jury to believe the core of one defense, they necessarily reject the core of the other defense.





State v. Gasbarri

ARCrP 16.2(b). Burden of Proof on Pretrial Motions to Suppress Evidence

- (1) Generally. Subject to (b)(2), the State has the burden of proving by a preponderance of the evidence the lawfulness in all respects of the acquisition of all evidence that the State will use at trial.
- (2) Defendant's Burden. If any of the conditions listed below are present, the State's burden of proof under (b)(1) arises only after the defendant alleges specific circumstances and establishes a prima facie case supporting the suppression of the evidence at issue:
 - (A) the evidence involves a confession, identification, search, or seizure, and the defendant is entitled under Rule 15 to discover how the evidence was obtained;
 - (B) defense counsel was present when the evidence was taken; or
 - (C) the evidence was obtained under a warrant.

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State v. Gasbarri

The Court of Appeals was really called on to decide whether the failure to provide a responsive briefing to a motion to suppress is an acquiescence to the contents of the motion.



Is actual evidence required before the trial court can make a ruling on a motion to suppress? (Hint—yes.).

State v. Gasbarri

The Arizona Supreme Court has held that arguments of counsel are not evidence. Instead, sworn affidavits, stipulated facts, depositions, oral testimony, etc. must introduced to support a motion to suppress. Similarly, a trial court's ruling on a motion to suppress must be grounded in evidence.

The Court of Appeals found that the trial court erred by granting the motion to suppress. The matter was reversed so Gasbarri could seek suppression should the state reinstitute the charges against him.

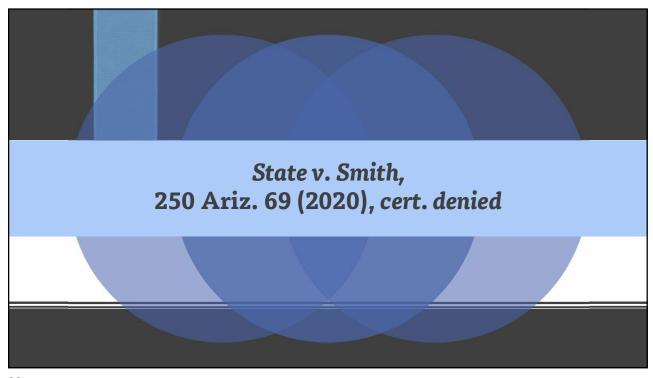
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State v. Gasbarri

Presiding Judge Staring started the opinion with some harsh criticism of the state:

"Despite acts and omissions by the state that, at the very least, evince incomprehensible inattention to a very significant case, we are constrained to conclude the trial court erred as a matter of law by granting Paul Gasbarri's motion to suppress evidence seized from a cell phone found in his possession. We therefore reverse."

We would all be wise to ensure that none of us is ever referred to in this way by a court.



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Background • Capital case—murder and child abuse • The state attempted to strike the only two African American prospective jurors. Smith objected. • Prosecutor: Juror 14 showed reluctance to impose the death penalty. Juror 211 had medical issues and scheduling conflicts. • The trial court permitted the strikes.

State v. Smith

ARCrP 18.4(c). Peremptory challenges

Race-based strikes violate the Equal Protection Clause.

Batson test:

- (1) the defendant makes a prima facie showing of discrimination;
- (2) the prosecutor offers a race-neutral reason for each strike;
- (3) the trial court then determines whether the defendant proved purposeful racial discrimination.

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State v. Smith

Smith made a prima facia showing: the prosecutor struck the only two African American jurors.

The prosecutor provided race-neutral reasons. Juror 14 was reluctant to impose the death penalty. Juror 211 had health problems and conflicting medical appointments.

Smith failed to show purposeful discrimination. The record supported the prosecutor's reasons and the court's observations.

Recent Batson developments Central AZ NLG petition to add ARCrP 24, amending Arizona's Batson procedure Two COA judges filed a rule petition seeking to eliminate all peremptory challenges.

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Capital case—jury coercion claim After 2.5 hours of deliberations, the jury told the court that it couldn't agree on a sentence. The court briefly discussed the situation with the foreman. Then the court reread the Duty to Consult with One Another and gave the Impasse instructions. Afterwards, the court sought to reassure the jury: they could deliberate further or not at all, depending on what they thought was appropriate; they could seek assistance from the court and parties.

State v. Smith

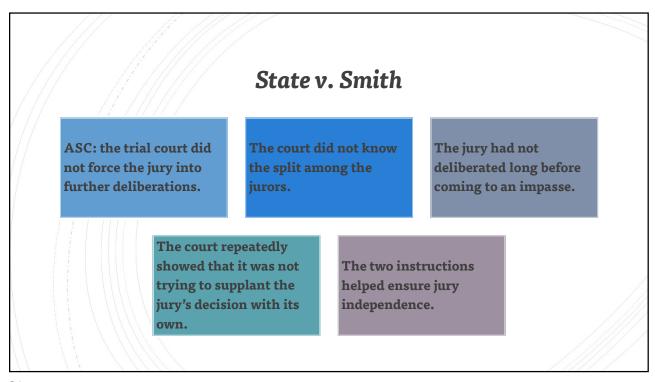
ARCrP 22.4(c). Assisting Jurors at Impasse

If the jury advises the court that it has reached an impasse in its deliberations, the court may, in the parties' presence, ask the jury to determine whether and how the court and counsel can assist the jury's deliberations. After receiving the jurors' response, if any, the court may direct further proceedings as appropriate.

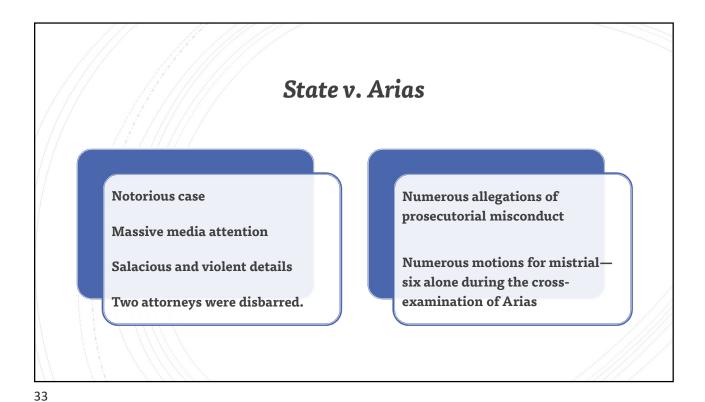
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State v. Smith

- An appellate court reviews claims of jury coercion to determine whether the trial court's actions or comments displaced the independent judgment of the jury.
- Among the factors considered are:
 - · whether the trial court knows how the jury is divided;
 - how long the jury had been deliberating before impasse.







"To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct so infected the trial with unfairness as to make the resulting conviction a denial of due process." Arias, 248 Ariz. at 555, ¶ 30.

"In other words, the misconduct must be so pronounced and persistent that it permeates the entire atmosphere of the trial."

Id.

It is reversible error only where a reasonable likelihood exists that the misconduct could have influenced the jury's verdict.

State v. Arias

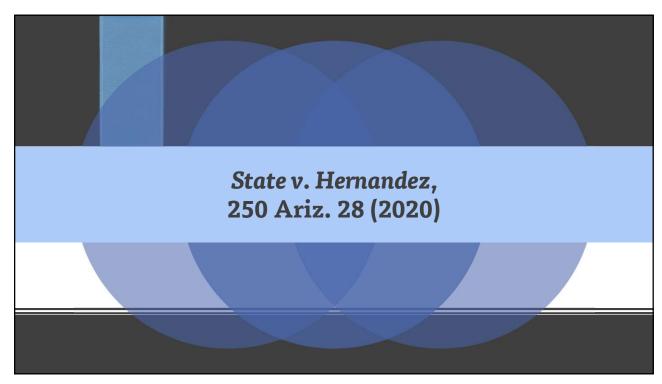
Arias repeatedly complained that:

- the prosecutor screamed at her;
- his tone and demeanor were intimidating;
- she had trouble focusing as well as listening to and answering his questions;
- the prosecutor displayed considerable anger.

The COA found that:

- the prosecutor was argumentative, aggressive, combative, and bullying;
- nevertheless, the prosecutor's conduct did not lead to her conviction;
- the overwhelming evidence of her guilt led to her conviction.

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State v. Hernandez

Background

- Car ran a stop sign, almost collided with patrol vehicle;
 three men bailed from the car and fled
- Deputy gets a good look at driver and soon thereafter IDs driver as Hernandez
- Car is initially impounded, though not tested for evidence; returned to owner who reported it stolen
- Hernandez apprehended months later; defends unlawfulflight charge by denying that he was driver
- He sought a Willits instruction, claiming that the police should have tested car for fingerprints and DNA.

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State v. Hernandez

ARCrP 21.1 (referring to ARCP 51(b)): jurors must be instructed on the law

Willits instruction:

If you find that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the defendant's guilt.

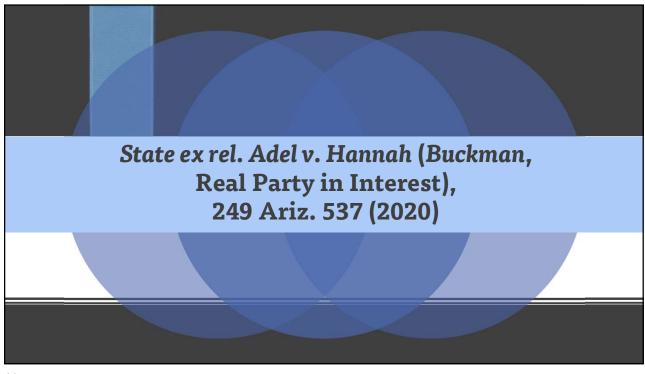
State v. Hernandez

- The state generally has no obligation to gather potentially exculpatory evidence for a defendant.
- But the state must preserve obviously material and reasonably accessible evidence that has a tendency to exonerate the defendant.
- If the state fails to so preserve, and prejudice results, the defendant is entitled to a Willits instruction.
- Obviously material: evidence that, at the time of its discovery, the state knows it or the defense will use for trial
- Tendency to exonerate: real likelihood that the lost material had evidentiary value; can't be speculative
- Willits instruction: available for innocent and badfaith loss of evidence

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State v. Hernandez

- The trial court properly denied the request for a Willits.
- The deputy had already ID'd Hernandez; he had no need to search the car for fingerprint and DNA evidence to establish ID.
- The deputy didn't know that evidence might be material for Hernandez's defense.
- Hernandez had only speculated that the evidence would have benefitted him.
- Caveat for other cases:
 - where the state fails to preserve evidence that is not obviously material at
 the time of the state's investigation but later turns out to be material, the
 trial court must determine whether the state's failure to appreciate the
 evidence's materiality was reasonable.



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State ex rel. Adel v. Hannah

Rule 24.2. Motion to Vacate Judgment

- (b) Time for Filing. A party must file a motion under this rule no later than 60 days after the entry of judgment and sentence, or, if a notice of appeal has already been filed under Rule 31, no later than 15 days after the appellate clerk distributes a notice under Rule 31.9(e) that the record on appeal has been filed.
- The rule establishes that the time runs from entry of judgment and sentence; a trial court has no authority to rule on a motion to vacate judgment until it has entered a judgment and imposed a sentence.

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State ex rel. Adel v. Hannah

Enmund/Tison verdict

Before a person convicted of felony murder can be sentenced to death, the jury must find that the defendant:

- killed, attempted to kill, intended for a killing to occur, or intended for lethal force to be used; or,
- was a major participant in the underlying felony and acted with reckless indifference.

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State ex rel. Adel v. Hannah

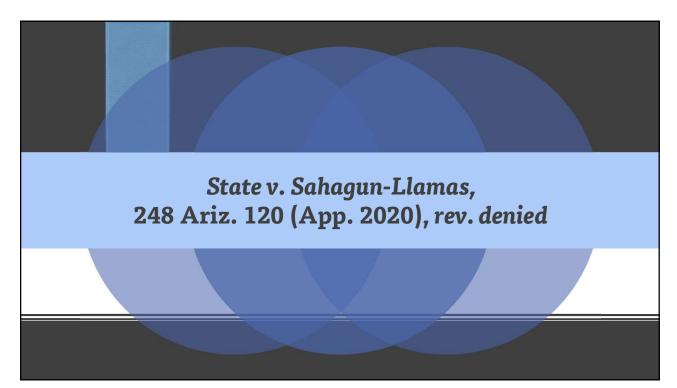
- The jury returned an Enmund/Tison verdict but could not reach a unanimous decision about the sentence. The trial court declared a mistrial.
- The Supreme Court indicated that it must decide if an Enmund/Tison verdict, constitutes a judgment and sentence for purposes of Rule 24.2.
- ARCrP 26.1
 - (b) Judgment. "Judgment" means the court's adjudication that the defendant is guilty or not guilty based on the jury's or the court's verdict, or the defendant's plea.
 - (c) Sentence. "Sentence" means the court's pronouncement of the penalty imposed on the defendant after a judgment of guilty.

State ex rel. v. Hannah

"Given the definitions of these two words, an Enmund/Tison verdict cannot constitute a judgment or sentence, much less a judgment and sentence. The jury's aggravation phase verdict found Buckman eligible for the death penalty; it did not comprise the trial court's judgment that Buckman was guilty of the charged offenses, nor its pronouncement of her penalty." Buckman, 249 Ariz. at 539, ¶ 1.

"A court cannot vacate a judgment and sentence where none exists." Id. at \P 14.

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State v. Sahagun-Llamas

Background

- Shootout during a drug exchange
- Parties disputed who fired bullet that entered a busload of children and struck the driver
- During trial, Sahagun-Llamas absconded.,
- Years later, it was discovered that the court reporter hadn't turned in notes for the testimony of the only defense witnesses.
- The reporter died before anyone became aware that the notes were missing.
- In lieu of the missing transcript, the State submitted a written statement, which Sahagun-Llamas objected to as grossly inadequate.

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State v. Sahagun-Llamas

A defendant has a constitutional right to a record adequate enough to provide a meaningful appeal. The existing record must permit the appellate court to consider any issues the defendant raises.

Lacking a transcript, the parties may have to provide a written statement as allowed by ARCrP 31.8(d).

State v. Sahagun-Llamas

The COA found that:

- the prosecutor's written statement was inadequate:
 - was only 2½ pages long, lacked detail, not a substitute for a day's worth of testimony;
 - made assumptions about testimony based on the attorneys' opening statements;
- the missing transcript covered the heart of Sahagun-Llamas's case;
- the trial judge had little memory of the case and his notes contained little substance.

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The Honorable David Cutchen
Presiding Judge
Gilbert Municipal Court

Gary L. Shupe
Deputy City Prosecutor
Phoenix City Prosecutor's Office



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